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In the Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES GOLDFARB, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER A CHANGE IN THE THEORY OF ILLEGALITY IN AN INDICTMENT UNDER WHICH THE DEFENDANT STANDS CHARGED WHICH IS WORKED BY A TRIAL COURT'S JURY INSTRUCTIONS CONSTITUTES A CONSTRUCTIVE AMENDMENT OF THAT INDICTMENT, CONTRARY TO THE PROTECTIONS AFFORDED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

II.

WHETHER CONDUCT WHICH AT MOST VIOLATES NONPENAL STATE ADMINISTRATIVE REGULATIONS CAN CONSTITUTE "UNLAWFUL ACTIVITY" UNDER AN INDICTMENT CHARGING CONSPIRACY TO VIOLATE AND VIOLATION OF THE TRAVEL ACT, 18 USC § 1952?

III.

WHETHER INSTRUCTIONS WHICH PRESENT A JURY WITH ALTERNATE THEORIES OF ILLEGALITY, BUT DO NOT CAUTION THAT ALL JURORS MUST AGREE ON WHICH THEORY IS THE BASIS OF ANY CONVICTION DEPRIVES A DEFENDANT OF THE RIGHT TO A UNANIMOUS VERDICT?

PARTIES TO THE PROCEEDINGS BELOW

Charles Goldfarb, James Tamer, James Abraham, Edward Monazym and The Aladdin Hotel Corporation were indicted jointly in the United States District Court for the Eastern District of Michigan, and were all convicted in that court of, variously, violation of the Travel Act, 18 USC §1952, and/or conspiracy to violate that statute. They each appealed those convictions as of right to the United States Court of Appeals for the Sixth Circuit, which consolidated those appeals for hearing and decision. The within Petition seeks review of the decision of the Court of Appeals which affirmed all convictions. While it is submitted by Charles Goldfarb only, it is the understanding of petitioner herein that the other defendants in the courts below either have filed or will file petitions seeking writs of certiorari to review the propriety of their convictions as well. The issues presented herein are relevant to the convictions of all of the defendants in the court below (and petitioners in this court), and certain of the issues to be presented by other of the defendants below (and petitioners here), most notably by James Tamer, are particularly relevant to the propriety of the conviction of petitioner.[1]

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[1] It is specifically the intention of the petitioner Goldfarb to adopt the arguments put forward in the Petition for Certiorari being filed on behalf of James Tamer, as well as such arguments advanced by other petitions filed on behalf of individuals who were co-defendants in the proceedings below which may be applicable to him.

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JURISDICTION

The Opinion of the Sixth Circuit Court of Appeals affirming the Petitioner's conviction in the United States District Court for the Eastern District of Michigan was entered on March 5, 1981. His timely filed Petition for Rehearing was denied by Order of that court April 1, 1981. This Court's jurisdiction to review the decision of the Court of Appeals by writ of certiorari is invoked under 28 USC §1254(1).

PROVISIONS OF LAW AND REGULATIONS INVOLVED

The relevant provisions of federal constitution and statute, and of state statute and regulation are as follows:

United States Constitution, Amendment V

United States Constitution, Amendment VI

18 USC §371

18 USC §1952

Nevada Revised Statutes 463.160.1(a)

Nevada Revised Statutes 463.335

Nevada Gaming Commission Regulation 3.100

Nevada Gaming Commission Regulation 3.110

Because they are lengthy, their pertinent text is not set forth here, but, as suggested by Rule 21.1(f) of the Rules of this Court, are reproduced as part of the Appendix to this Petition, following the Opinion of the Sixth Circuit Court of Appeals affirming petitioner's conviction, and the Order of that court denying rehearing.

No. 80-

In the Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES GOLDFARB, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner, Charles Goldfarb, was charged by way of indictment in the United States District Court for the Eastern District of Michigan, with violation of the Travel Act, 18 USC §1952 and conspiracy to violate that statute, in violation of 18 USC §371.

The charges of which the petitioner was convicted grew out of his involvement with the Aladdin Hotel and Casino, a licensed gaming establishment in Las Vegas, Nevada. Also charged along with the petitioner were James Abraham, the vice-president and general manager of the Aladdin, Edward Monazym, a casino "host" employed by the Aladdin, the Aladdin Hotel Corporation itself, and one James Tamer, who served as the entertainment director of the hotel.

All defendants were charged in the conspiracy count, which charged, essentially, a conspiracy to use the facilities of interstate commerce (the telephone) to facilitate the carrying on of an activity

alleged to be in violation of Nevada state law — essentially, according to the tenor of the indictment, the unlicensed ownership, operation and conduct of the gaming affairs of the Aladdin Hotel.

Additionally, the defendants Goldfarb, Tamer, Abraham and Monazym were charged with substantive Travel Act violations on the basis of specific telephone calls; each of these calls was also alleged as one of the overt acts in the conspiracy count.[2]

A jury trial was conducted before the Honorable John Feikens, Chief Judge of the District Court. As the evidence showed, Charles Goldfarb had been part of a group which had bought the Aladdin Hotel in 1971 from its then owner, the Recrion Corporation. The hotel was operating at a loss and was purchased for the "bargain" price of $5.1 million. Although the petitioner had previously been licensed as a part owner of another Las Vegas casino, when the new owners of the Aladdin applied to the Nevada Gaming Commission (the administrative body which is empowered to grant or deny gaming licenses in the State of Nevada) for licensure, that body rejected the application as to the petitioner on the basis of a finding that he possessed an "unsuitable background and unsuitable associations." Upon the rejection of his application, petitioner surrendered the stock which had been issued him in the newly formed Aladdin Hotel Corporation. However, he secured an option to purchase stock from one of the stockholders whose application had been approved, and reapplied to the Gaming Commission for approval as a stockholder of the Corporation. That application was still pending at the time of trial.

The bulk of the government's trial evidence was obtained through the interception of wire communication on telephones located at the petitioner Goldfarb's office and home telephones, and the defendant Tamer's place of business.

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[2] Two counts under the RICO statute (18 USC §1961 *et seq*), and a number of Travel Act counts were dismissed prior to trial, pursuant to unappealed pretrial orders of the District Court.

The telephone calls, together with hotel records and the testimony of some witnesses, unquestionably showed a degree of involvement in the affairs of the Aladdin Hotel on the part of the petitioner Goldfarb. It was the nature and significance of that involvement that was disputed by the government and defense.

For example, the evidence certainly showed that the petitioner sent, or referred, a large number of persons to the Aladdin, and that many of these people received complimentary services (room, food and beverages) and were permitted to gamble on credit. "Comps" and casino credit, the testimony showed, are freely given in Las Vegas, but the significance of their extension in this case was a central fact at issue at trial.

It was the contention of the government that Goldfarb was authorizing these complimentary services and extending this credit; petitioner, on the other hand, sought to show that he was merely referring customers to the hotel and making recommendations as to the extension of complimentary privileges and gambling credit, which the hotel sometimes followed, and sometimes did not, but with respect to which, the persons actually operating the Aladdin Hotel retained the discretion to follow or not follow, and that where the recommendations were followed it was because in the judgment of the hotel employees it was in the best interests of the hotel.

The evidence also showed that petitioner was involved in discussions of attempts to refinance or sell the hotel in order to alleviate cash flow problems. (As the testimony demonstrated, although the Aladdin was flourishing, and its worth had multiplied to something over $100 million, expansion had burdened the corporation with heavy debt service obligations.) Here again, the government contended that the evidence suggested a degree of control over the affairs of the hotel, while the defense argued that the conversations showed no more than interest, concern for the security of his potential investment (and the expectancy of ultimate profit therefrom — the option, for an eight percent interest, would potentially be worth some four to eight million dollars if the Gaming Commission permitted petitioner to exercise it), and a friendship with the persons actually involved in the management of the hotel and casino.

Some of the telephone calls contained statements by the petitioner to the effect that he had a "vested interest" in the hotel, or that he, from time to time, discussed "policy" to be implemented, or that he had caused changes to be made in certain hotel operations (for example, a new system for ordering breakfast through room service). Here again, there was no serious question as to whether or not petitioner had some involvement with the hotel, but rather what the nature of that involvement was: petitioner contended that his interest in the hotel was represented by the expectancy which resided in his unexercised option, as well as his friendship with the principals in the corporation, that it would not be unusual or improper for a member of the management team at the Aladdin (or anywhere else) to discuss the ups and downs of the enterprise with someone who was close to them, and who might one day soon sit among them, and that, no matter what their maker might have thought, the suggestions which petitioner made were only that — suggestions — and were only followed (when they were followed) because, in the independent judgment of the hotel management, it was in the interest of the hotel to do so.

The government, of course, contended these statements meant more, and were indicia of ownership or control.

Evidence also was adduced regarding the petitioner's involvement with co-defendant James Tamer, who was employed at the time in question as the entertainment director of the hotel. It was the government's theory that Tamer was in fact more than merely involved in the entertainment activities at the hotel, and the government presented at trial certain telephone conversations between Tamer and Goldfarb (as well as Tamer and others) regarding the financial affairs of the hotel, as well as evidence that Tamer and Goldfarb were working together in order to secure the expungement of an almost 40-year-old conviction of Tamer's, which was thought to stand in the way of Tamer's licensure or approval for involvement in affairs of the Aladdin which went beyond the area of entertainment.

On March 13, 1979, petitioner was convicted of both the substantive and conspiracy counts.[3] On July 9, 1979 he was sentenced to serve concurrent terms of three years in the custody of the Attorney General, and to pay a fine of $10,000 on each count of which he was convicted.

He duly perfected an appeal as of right to the Sixth Circuit Court of Appeals. On March 5, 1981, that court affirmed the convictions of the petitioner (and those of his co-defendants). A Petition for Rehearing was timely filed, and was denied by the Court of Appeals by Order of April 1, 1981.

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[3] James Tamer was acquitted of the substantive count against him, but convicted of the conspiracy count. The trial court granted a motion for a judgment of acquittal as to the substantive count against Edward Monazym, but Monazym was convicted by the jury on the conspiracy count. The defendant Abraham was convicted of both substantive and conspiracy counts, and the Aladdin Hotel Corporation was convicted of the conspiracy charge, the only charge against it.

REASONS FOR GRANTING THE WRIT

I.

THE TRIAL COURT'S JURY CHARGE WORKED A CONSTRUCTIVE AMENDMENT OF THE INDICTMENT, CONTRARY TO THE PROTECTIONS AFFORDED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BY EFFECTING AN UNANTICIPATABLE CHANGE IN THE THEORY OF ILLEGALITY UPON WHICH THE DEFENDANT'S GUILT OR INNOCENCE WAS TO BE JUDGED BY THE JURY

The Travel Act, 18 USC §1952, provides, in pertinent part, that:

> (a) Whoever . . . uses any facilities of interstate commerce . . . with intent to —
>
> > (e) . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity
> >
> > and thereafter does any other act of promotion, facilitation, and the like, shall be guilty of a felony.

The statutory definition of "unlawful activity" applicable to the instant case is found in subsection (b) of the statute:

> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling . . . offenses in violation of the laws of the state in which they are committed.

The Travel Act counts of the Indictment defined the "unlawful activity" which was the predicate for the charge of violation of §1952 as follows:

> The ownership, operation, conducting and carrying on of gaming operations of . . . the Aladdin Hotel and Casino, by a person who was not licensed by and whose interest in the gaming casino had been concealed from agencies of the State of Nevada in violation of Nevada

> Revised Statutes §§463.160.1(a) and 463.335, and Nevada Gaming Commission Regulations 3.100 ¶1, (b), (d), (f), (g) and (i); 3.100 ¶3, 3.110 and 8.060.[4]

The conspiracy count charged a conspiracy to violate §1952 in respect of such "ownership, operation, conducting and carrying on."

Throughout the course of the proceedings in the trial court, petitioner and the other defendants below sought to force the focusing of the charges against them, and the theory of illegality comprised by the indictment. The trial court's instructions to the jury, however, swept away whatever foothold they might have thought they had gained and redefined the "unlawful activity" charged by the indictment in such a way as to constitute a constructive amendment of the indictment, such as is forbidden by the Fifth Amendment to the United States Constitution. Although the constructive amendment worked by the trial court operated in a number of ways, it is most easily seen with respect to the trial court's treatment of the relationship between the Nevada state regulations referred to in the indictment and the charge against the defendants.

Early on, the defendants jointly filed a motion to dismiss the indictment for failure to charge an offense, the heart of which was that the indictment failed to make out an offense against the laws of the State of Nevada — a necessary predicate for Travel Act liability — because of the vagueness of the references to Nevada law,

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[4] This is the operative allegation of Count 1 of the indictment in its final form, the only substantive count in which the petitioner was a defendant. The substantive count against the defendant Tamer alleged violation of NRS 463.161(a) and Regulations 3.100 ¶1, (i), ¶3, 3.110 and 8.060; the substantive count against the defendant Abraham NRS 463.161(a) and 463.355 and Regulations 3.100 ¶1, (b), (f) and (i), 3.100 ¶3, 3.110 and 8.060. Each of the dismissed Travel Act counts refer to various permutations of what were basically the same array of statutes and regulations.

because the conduct complained of would not constitute a violation of the Nevada statutes set out in the indictment (NRS 463.160.1(a) and NRS 463.335), and because the regulations enacted by the Nevada Gaming Commission, not being "penal" in nature, could not form the predicate to a charge of violation of Nevada state law.

The cited statutes speak to the matter of what licenses and permits are required to conduct gaming in Nevada. The first, NRS 463.160.1(a) provides that "it shall be unlawful for any person, either as owner, lessee or employee . . . to deal, operate, carry on, conduct, maintain or expose for play . . . any game or slot machine . . . without having first procured, and thereafter maintaining in full force and effect, all . . . gaming licenses as required by statute or ordinance." The second, NRS 463.335, requires that persons classified as "gaming employees" procure "work permits" before being employed. Regulations 3.100 and 3.110 require a gaming licensee to disclose the identities of executives, employees or agents of a gaming licensee "having the power to exercise a significant influence over decisions concerning" its operations, or who are otherwise classified as "key employees" because of their supervision or involvement in gaming, or their participation in the formulation of "management policy." Regulation 8.060 forbids the involvement of a person with an application pending (such as the petitioner) from participating in the conduct of the gaming licensee of which he seeks to become a part.

The question of whether the regulations cited in the indictment formed an independent basis for the charge of the Grand Jury (so that conduct which violated only the regulations could constitute a basis for conviction) was of great significance from the first, because the only regulatory provision which in terms required disclosure or which in terms applied to the conduct of applicants for licensure (such as the petitioner) which were referred to in the indictment were the regulations, not the statutes cited.

The response of the Government to a great extent mooted serious debate on the effect of the regulations, however. In its response to the motion to dismiss the indictment for failure to state an offense,

the prosecution took the position that violations of the regulations could indeed not constitute "criminal acts within the purview of the Travel Act":

> The predicate "unlawful activity" in this prosecution arises from the violations of the cited Nevada statutes in each count (Government's response p. 7)

Or, as the government elsewhere put it:

> The citation in each count to the regulations violated by the Defendants, therefore, does not intend or constitute an attempt to charge "unlawful acts" independent of the criminal statutes concomitantly cited. We do not quarrel that the Defendants would be entitled to a charge that in order to find a defendant guilty of a particular count that it must find that the defendant violated the provisions of the *Nevada statute* cited and described therein. (Government's response p. 8)

Indeed, when jury instructions came to be discussed, both government and defense submitted requests to charge which would have cautioned the jury against convicting the defendants on the basis of conduct which they found merely to violate the regulations enacted by the Gaming Commission, and not the statutes themselves.[5]

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[5] The Government's proposed special instruction No. 14 suggested that the court instruct the jury that they "must distinguish Statutes from Regulations in your deliberations. The unlawful activity must be of a kind which furthers the violation of a State Statute, not just a Regulation. Put another way, if you find the defendant's conduct furthered the violation of a Regulation, but not a Statute, that element of the offense has not been proven." The Government's proposed instruction permitted the jury to consider the regulations in only two ways — neither of which allowed the Regulations any definitional significance with respect to "unlawful activity" — first, "the same conduct which furthers the violation of a Regulation may also further the violation of a Statute," and, second, "with respect to the conspiracy count . . . you may consider a violation of the Regulations . . . to be an act in furtherance of the conspiracy."

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However, the court not only declined to give either of these instructions, but rather instructed the jury that the regulations "define" the unlawful activity charged:

> [THE COURT]: Now, as to the meaning of the phrase unlawful activity in the Travel Act, the State of Nevada has a comprehensive scheme of regulatory statutes. Under those statutes a gaming commission and a gaming board are established and they are commanded to and have enacted regulations which have force of law. It is that law which defines unlawful activity. [Trial Transcript (hereafter "TT") pp. 3973-3974.]

The court specifically delineated the nature of the regulations' commands:

> [THE COURT]: I now take up another aspect of the Nevada laws on gambling. One of the regulations. 300. 100, which is mandated by Nevada statute is required, all holders of non-restricted licenses to disclose to Nevada gaming authorities names of all persons exercising significant control and influence over gaming. Any changes in such activities must also be reported to the Nevada gaming authorities because of a strong state policy requiring disclosure of all persons who have significant control and influence as to gaming, and because of the

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The defendants put forward an instruction tailored to the treatment given Gaming Commission Regulations in *United States v. Polizzi*, 500 F2d 856, 875 (9th Cir. 1974): the defendants proposed that the jury be instructed that evidence of a knowing and willful violation of a regulation could be considered on the question of the defendants' "specific intent to engage in an unlawful activity in violation of Nevada law. However, the fact that the particular conduct of a defendant may have constituted a violation of a Nevada regulation cannot form the basis for a finding that the conduct of the defendants constituted an 'unlawful activity,' as charged by the Government." (Goldfarb and Tamer Requested Jury Instruction No. 9.)

> statutory command that all gaming licenses which, whether held by a corporation such as the Aladdin Hotel or by individuals, must be maintained in conformity with all relevant provisions. [TT p 3975]

While the above instructions were addressed specifically to the conspiracy count, the court directly incorporated them into its instructions on the substantive charge:

> [THE COURT]: Heretofore I have discussed with you in considering the charge of conspiracy as to entail the meaning of the phrase unlawful activity. Without repeating those instructions that I gave you then [but] with the request that you keep them in mind here . . . [TT, p. 3982]

Beyond this unanticipatable treatment of the regulations, the trial court additionally reached beyond the four corners of the indictment and instructed the jury not only as to what it perceived to be the general scheme of Nevada's regulation of gaming, but also, to specifically define duties and standards of conduct with reference to Nevada statutes which were not referred to in the indictment, and which had not previously been the subject of proof or accusation in any other manner.

Thus, for example, the trial court instructed the jury on what it perceived to be the "gist" of the Nevada regulatory scheme:

> [THE COURT]: In order to regulate gambling under Nevada law these statutes require full disclosure. Only through full and accurate disclosure of all persons who are connected with gambling in Nevada can the Nevada gaming authorities properly perform their functions in excluding from that industry all who are, in the authorities' opinions, unsuitable or undesirable for any number of reasons. [TT, p. 3974]

Significantly, the court's instructions to the jury on some Nevada statutes not mentioned in the indictment went to the very basis of the theory of illegality derived by the trial judge regarding unlicensed operation or conduct of a gaming establishment:

> [THE COURT]: Now, against this general background, the following Nevada statutes are pertinent: Nevada Revised Statute 463.530 requires that all persons who require to become owners or shareholders in a gaming operation must have come before the Nevada gaming authorities for determination as to the suitability for license. The Nevada gaming authorities then make a decision whether to then issue a license to an applicant. If they deny the applicant a license, that person may not then thereafter exercise any ownership of, operation or conduct of the gaming affairs of the casino.
>
> Another Nevada statute, NSR 463.130 [NRS 463.360] states that the violation of these Nevada gaming statutes is a crime, a gross misdemeanor. Thus, by concealment of his ownership or operation or conduct in the gaming conspiracy, a person may violate the Nevada laws. [TT, pp. 3974-3975]

Petitioner argued at all points that, among other things, the jury instructions constituted a judicial amendment of the indictment. The trial judge turned away this argument upon the basis that its interpretation of Nevada law "presented Defendants with no new factual charges that they were required to meet." (Opinion Denying Post-Trial Motions, p. 5.) The Court of Appeals, in affirming petitioner's conviction, merely quoted the trial court's decision in this regard, and indicated its concurrence with that opinion.

The question which this Court should grant certiorari to resolve is, as simply stated as possible, whether a divergence from the theory of illegality alleged in a grand jury indictment constitutes a constructive amendment of that indictment, notwithstanding the fact that that change presents the defendant with no new allegations of fact. While this Court has never squarely stated such a rule, the position of the petitioner is strongly suggested by a number of its previous decisions, as well as by the basic concept of amendment.

The rule against constructive amendment, most frequently associated with the decisions of this Court in *Ex Parte Bain*, 121 US 1 (1887) and *Stirone v. United States*, 361 US 212 (1960), is a prod-

uct of the Fifth Amendment's guarantee of prosecution by grand jury, but is also implicated by due process considerations. As this Court wrote in *Dunn v. United States*, 442 US 100, 106 (1979): "few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused."

The rule against constructive amendment, simply stated, is that the charges in an indictment may not be amended, either through their literal change or constructively, through events at trial. As the Sixth Circuit Court of Appeals put in *Watson v. Jago*, 558 F2d 330, 333 (6th Cir. 1977):

> Under the Fifth Amendment's provision that no person shall be held to answer for capital crime unless on the indictment of a grand jury, it has been the rule that after an indictment has been returned its charges may not be broadened except by the grand jury itself.

Or, as the Distict of Columbia Circuit stated the principle in *Gaither v. United States*, 413 F2d 1061, 1071 (DC Cir. 1969), "an *amendment* of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them."

The right to be tried only upon the charge of the grand jury, and to fair notice of the nature of that charge is the essence of the protection afforded by the rule against constructive amendment, and it is no answer to the petitioner's complaints regarding the jury instructions, which reframed the theory of illegality upon which the indictment was returned and the case tried to say that the trial court's instructions worked no change in the facts. Indeed, such a response seems to misconceive the basic thrust of the rule.

As this Court noted in *Cole v. Arkansas*, 333 US 196, 201 (1948):

> No principle of procedural due process is more clearly established than that of notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of

> every accused in a criminal proceeding in all courts, state or federal.

The trial court's instructions in the case at bar shifted the contours of the charge against the petitioner and, while adding no new "factual charges," impaired his ability to defend against the charge of the grand jury by altering the legal consequences of that defense. Thus, for example, in the court's central instruction regarding the effect of Gaming Commission Regulation 3.100, set forth above, the trial judge instructed the jury that the regulation that "defines unlawful activity" in the context of the case at bar requires the reporting of the "names of all persons exercising significant control and influence over gaming." The court, building upon this interpretation of the regulation, elsewhere instructed the jury that such unreported control and influence was an element of the charge of "unlawful activity" against the petitioner.

Any person who is an extremely large bettor, or who refers large numbers of gamblers to a casino can exercise "significant control and influence over gaming," for obvious reasons, merely by virtue of such gaming, and without having any proprietary interest or authority over the affairs of the gaming establishment. A significant portion of what had started out to be petitioner's defense was aimed at establishing that, rather than being an "owner or operator" of the Aladdin, the deference which was shown him by Aladdin employees was due in significant part to his own gambling activities, and his introduction of high stake gamblers to the hotel. Such a theory of defense is obviously confounded when, at the eleventh hour, the trial court instructs the jury on a reading of the regulation which turns the defense proffered into a virtual confession of guilt and makes that regulation a principal determiner of the charge against the defendant, notwithstanding all previous understandings that a mere violation of the regulations would not constitute "unlawful activity."

It is no answer to say, as the trial court did, and the Court of Appeals repeated, that it does not matter that the "grand jury did not pass upon the exact shape of the illegal acts in Nevada," since all it needed to know was "enough of the Nevada gaming laws to make

the indictment sufficient." (Trial Court's Opinion Denying Post-Trial Motions, quoted at Slip Opinion, p. 20.) It is not the function of federal trial courts to fill in the pieces of an unformed mosaic in an indictment, but rather, to assure that the charge upon which a defendant is tried is indeed the charge of the Grand Jury.

As this Court wrote in *Russell v. United States*, 369 US 749, 770, (1962):

> To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure.

Although the Court there wrote in a different context, its perception of the guarantees of the Fifth Amendment is instructive as to the question here posed. Identical conduct may or may not be criminal under different charges which a grand jury may frame. It would seem that the intertwined protections of the Fifth Amendment's guarantee of prosecution by grand jury, and of fair notice of the charges against one, as contemplated by the due process clause of that Amendment, must be seen as protecting against an after-the-fact reinterpretation of the grand jury's charge, where such a reinterpretation alters the basis upon which criminal liability may or may not attach.

This Court's holding in *Bouie v. Columbia*, 378 US 347, 353 (1964), to the effect that the due process clause protects a defendant against "an unforeseen judicial enlargement of a criminal statute," seems to suggest such a conclusion. Indeed, so does the Sixth Circuit's own decision in *Watson v. Jago, supra*, which holds that a constructive amendment took place where a state court indictment charging first degree murder on the theory of premeditation was tried on the theory that the killing was first degree murder because committed in the course of a felony. In both cases — the unforeseen enlargement of a criminal statute, or the change in the premise upon which particular conduct is seen to come within a previously

defined statute — there occurs the same kind of unfairness: a defendant indicted on the basis of one theory of illegality may be convicted under a different theory as to why the same conduct is illegal.

Notwithstanding what seems to petitioner to be the clear import of those decisions of this Court which define the nature of the protections implicated by the Fifth Amendment rights to prosecution by grand jury indictment and fair notice of the charges against one, the decision of the court below bespeaks a need for guidance as to the benchmarks by which these protections are to be enforced. The question is a clear and clearly defined one: whether a change in the theory of illegality, which adds no new factual material but which changes the basis upon which a defendant may be convicted of a violation of federal law, constitutes a constructive amendment of a grand jury's indictment? The question is an important one, implicating as it does basic constitutional protections, and striking as it does at the very core of the adversarial system of criminal justice. It should receive a clear and definite answer by this Court, and the case at bar provides an eminently appropriate vehicle for this Court to furnish that answer.

II.

THE TRIAL COURT'S INSTRUCTIONS PERMITTED CONVICTION FOR VIOLATION OF THE TRAVEL ACT, AND CONSPIRACY TO VIOLATE THAT STATUTE, ON THE BASIS OF CONDUCT WHICH AT MOST VIOLATED NONPENAL STATE REGULATIONS.

As noted above, the trial court's instructions defined a theory of illegality by reference to Nevada Gaming Commission regulations. It specifically synthesized one prong of its definition of unlawful activity with reference to disclosure requirements which it derived from the Gaming Commission regulations cited in the indictment. (Indeed, as noted previously, of the provisions referred to in the in-

dictment, only the regulations deal with disclosure.)[6] Under the Court's instructions, the jury could find petitioner guilty by finding that his actions were aimed at violating these disclosure requirements, which were defined on the basis of the requirements of the regulations only — on the basis that is, that his conduct only violated the regulations' commands, as interpreted by the trial judge.

The effect which the trial court thus gave to the regulations is in conflict with those decisions of this Court which clearly define the extent to which violations of federal law may be premised upon a finding that conduct is in contravention of mere administrative regulations, as opposed to legislative enactments.[7]

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[6] Thus, for example, the trial court instructed the jury in part as follows:

> [THE COURT]: I instruct you that it is illegal under Nevada gaming laws for anyone exercising a significant control and influence as to gaming to conceal that control and influence from the Nevada gaming authorities. The essence or gist of the violation I have just outlined is concealment for which failure to disclose, this must be contrasted with the first instance of violation I described earlier, that violation having to do with an unlawful — or unlawful licensing violation of the Nevada casino, where the concealment is a means to achieve the violation but not itself the actual unlawful activity. [TT, pp. 3975-3976]

[7] It is the understanding of the petitioner that it is the intention of James Tamer, who was a co-defendant in the proceedings below, to file a Petition for Certiorari which advances an argument that is to a degree concentric with the argument put forth here. Petitioner Goldfarb wishes to adopt and join in that argument, inasmuch as it is directly applicable to his conviction of the conspiracy count, (under which Mr. Tamer was convicted) and, because of the trial court's incorporation by reference of its definition of "unlawful activity" in its conspiracy instructions to the jury's consideration of the substantive counts (see discussion *supra*), it is applicable as well to his conviction of the substantive count in which he was charged (in which Mr. Tamer was not a defendant.)

The indictment alleged that the petitioner conspired to and in fact violated that portion of the Travel Act which prohibits the use of a facility of interstate commerce with intent to promote, manage, establish, carry on or facilitate an "unlawful activity" involving gambling "offenses in violation of the laws of the state in which they are committed."

As the Second Circuit Court of Appeals wrote in *United States v. Kahn*, 472 F2d 272, 277 (2d Cir. 1973), "the initial inquiry in a Travel Act case is whether the underlying activity violates a state law." There must be an underlying "unlawful activity," and that "unlawful activity" must involve state law offenses. In the words of Ninth Circuit in *United States v. Hyatt*, 527 F2d 1048, 1051 (9th Cir. 1976), "the existence of a state law violation is an element of the violation of the Travel Act."

There can be no "violation of law" sufficient to form the basis of criminal liability by virtue of conduct which merely violates a nonpenal administrative regulation. This has been clear ever since this Court's decision in *United States v. Eaton*, 144 US 677, 688 (1892), where, in holding that a violation of regulations promulgated by the Commissioner of Internal Revenue under the Oleomargarine Act of 1886 did not submit a defendant to criminal prosecution, the Court wrote:

> It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted "in violation of a public law, either forbidding or commanding it" ... It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the Oleomargarine Act, for carrying it into effect, would be considered a thing "required by law" in the carrying on or conducting of the business ... Regulations prescribed by the President and by the heads of departments, under authority granted by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them

> is a thing so required by law as to make the neglect to do a thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense.

Similarly, in *United States v. Grimaud*, 220 US 506, 519 (1910), the Court made clear the distinction that would divide regulations the violation of which may be the basis for criminal liability from those in which it may not be — whether the legislative body which authorizes the promulgation of regulations specifically provides that a violation of the rules or regulations of the administrative body is criminal:

> But the very thing which was omitted in the Oleomargarine Act has been distinctly done in the Forest Reserve Act, which, in terms, provides that "any violation of the provisions of this Act or such rules and regulations (of the Secretary) shall be punished" as proscribed . . .

Under this test, which has been adhered to by subsequent decisions of this Court, see *e.g.*, *United States v. Howard*, 352 US 212 (1957), *Singer v. United States*, 323 US 338 (1945), the regulations of the Nevada Gaming Commission are clearly not penal in nature, and therefore are not such that their violation constitutes a "violation of the laws of the state." This is because while Chapter 463 of the Nevada Revised Statutes, entitled "Licensing and Control of Gaming," does indeed authorize the promulgation of gaming regulations (NRS 463.150(1)), the penalty section of Chapter 463 (NRS 463.360(3)) does not incorporate the regulations of the Nevada Gaming Commission, but rather only provides that "the violation of any of the provisions of this chapter" shall constitute a "gross misdemeanor." Indeed, in *United States v. Gordon*, 464 F2d 357 (9th Cir. 1972), the Ninth Circuit Court of Appeals specifically held that a violation of Nevada Gaming Commission regulations "can only lead to civil sanctions."

The treatment of this issue by the Sixth Circuit Court of Appeals recognizes but avoids the impact of this Court's decisions in such cases as *Eaton* and *Grimaud*, *supra*. While agreeing that instructions which would permit a finding of "unlawful activity" to be

predicated upon conduct which the jury found violative only of Gaming Commission Regulations, and not necessarily of statutes, would be "prejudicial error," the Court of Appeals nonetheless wrote that the trial judge "did not instruct the jury at any place that a violation of a regulation, in and of itself, constituted an 'unlawful activity.' " (Slip Opinion, pp. 11-12.)

It is true, although a matter of no consequence whatsoever, that the trial judge never spoke the words "a violation of a regulation in and of itself can constitute 'unlawful activity.' " Without using those words, however, there is simply no question that that is precisely what his instructions told the jury.

The first words which the trial judge used in his instructions to the jury with respect to the definition of "unlawful activity" were the following:

> [THE COURT]: Now, as to the meaning of the phrase unlawful activity in the Travel Act, the State of Nevada has a comprehensive scheme of regulatory statutes. Under those statutes a gaming commission and a gaming board are established and they are commanded to and have enacted regulations which have the force of law. *It is that law which defines unlawful activity.* [TT, pp. 3973-3974] (Emphasis supplied.)

Thus, in specific and unambiguous terms, the trial judge told the jury that the Nevada regulations have the force of law and that it is "that law which defines unlawful activity." How much more specific could the instructions have been? A trial judge does not instruct in a vacuum — rather his instructions come against the background of the testimony at trial. In the instant case, the jury had heard extensive testimony regarding Gaming Commission Regulations 3.100 and 3.110, and had had the text of the regulations published to it during the course of the trial, and explained to it by an "expert" on Nevada Gaming law who had been called by the government.

Within moments after giving the portion of the instruction set forth above, the trial court instructed the jury as follows:

> [THE COURT]: I now take up another aspect of the Nevada laws on gambling. One of the regulations, 300. 100 [sic], which is mandated by Nevada statute is required [sic], all holders of non-restricted licenses to disclose to the Nevada gaming authorities the names of all persons exercising significant control and influence over gaming. [TT, p. 3975]

This statement, and the explanation of the contents of that regulation which immediately followed were themselves immediately followed by an instruction from the court that "it is illegal under Nevada gaming laws for anyone exercising a significant control and influence as to gaming to conceal that control and influence from the Nevada gaming authorities." This formulation of what is "illegal" exactly parallels and mirrors the court's explanation of the disclosure which it instructed the jury Regulation 3.100 requires — "names of all persons exercising significant control and influence over gaming." How could the jury have thought other than that it was the Nevada regulations, rather than anything else, which defined the duty of disclosure, and the parameters of the theory of "unlawful activity" being explained to it by the court, and which controlled what was "legal" and "illegal"?

When the court came to the substantive counts, it first instructed the jury that it should keep in mind the instructions given with respect to the conspiracy charge (from which the above quoted portions are taken) with respect to the meaning of the phrase "unlawful activity."

In defining the charge of "unlawful activity" in the substantive count against the defendant Tamer, the court again summarized what it took to be a disclosure requirement alleged by the Indictment to have been violated, and told the jury:

> [THE COURT]: The regulation that requires this disclosure *has the force of law* and its requirement of disclosure is in harmony with a number of *other Nevada gaming statutes*. [TT, p. 3988] (Emphasis supplied.)

This instruction not only repeats the court's previous error of ascribing to a regulation "the force of law," but, perhaps more significantly,

specifically equates statutes and regulations, by referring to the regulations as compared with "other Nevada gaming statutes." In terms and in context, the instruction of the court tells the jury that regulations are the same as statutes — how could the jury have failed to have concluded that a violation of a regulation was the same as a violation of some "other Nevada gaming statute"?[8]

Additionally, it seems clear, at the very least from the trial court's rejection of both government and defense requests for cautionary instructions as to the effect of the regulations (see footnote 5 *supra*) that the trial judge *intended* to instruct the jury that a violation of the regulations, without more, could form the predicate for a finding of "unlawful activity."

The Sixth Circuit also approved the trial court's instructions on the basis that "the disclosure provisions required by Regulation 3.100 are cumulative to those contained in the Nevada statutes. NRS 463.165, 463.339, 463.520, 463.530, 463.560." (Slip Opinion, p. 13.) However, the fact of the matter is that the provisions of Regulation 3.100 which requires the disclosure of "every individual who is directly or indirectly engaged in the administration or supervision of the gaming operations or physical security activities" of a licensee is far broader than any of the disclosure requirements of the statutes cited. Additionally, the statutes referred to by the Court of Appeals were never referenced by the indictment, and, indeed, were not relied on by the trial court in its instructions. Rather, those instructions, and the proofs at trial were aimed solely and specifically at the disclosure requirements of the nonpenal regulations promulgated by the Nevada Gaming Commission, and at no other provision. As such, those instructions, and the approval of them by the Court of

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[8] It is true that Tamer was acquitted of the substantive count. However, the court's instructions must be taken as a whole, and there is no question but that this instruction had the capacity to influence and mislead the jury as to the totality of its deliberations, particularly in view of the fact that the court, as noted in the text, cross-referenced its instructions on the "unlawful activity" portions of both substantive and conspiracy counts. Moreover, the confusion could not help but spill over to affect the petitioner.

Appeals run clearly afoul of the clear authority of this Court's previous decisions which forbid such reliance on administrative regulations of this sort, and call for the invocation of this Court's authority on certiorari to correct such departures from "applicable decisions of this court." Rule 17.1(c), Supreme Court Rules.

III.

THE TRIAL COURT'S INSTRUCTIONS PRESENTED THE JURY WITH ALTERNATE THEORIES OF ILLEGALITY, BUT FAILED TO CAUTION THE JURORS THAT THEY MUST ALL AGREE AS TO THE SUFFICIENCY OF THE GOVERNMENT'S PROOF WITH RESPECT TO ANY THEORY UPON WHICH A CONVICTION WAS BASED, IN VIOLATION OF THE REQUIREMENT OF A UNANIMOUS VERDICT.

With respect to both the substantive and conspiracy counts against the petitioner, the trial judge instructed the jury on alternate theories of "unlawful activity." With respect to the conspiracy count, the court's instructions defined two species of violations of what it perceived to be the provisions of Nevada law: under one theory, "the violation is the unlicensed ownership or operation of the gaming casino which is accomplished by . . . concealment," while, under the other theory, "the essence or gist of the violation . . . is concealment . . . contrasted with the first instance of violation I described earlier, that violation having to do with . . . unlawful licensing violation . . . where the concealment is a means to achieve the violation but not itself the actual unlawful activity." [TT, pp. 3975-3976]

Indeed, in its post-trial Opinion denying motions for new trial and the like, the trial judge recognized that he had specifically intended to define two species of unlawful activity — one being operation through concealment and the other concealment of operation. (Opinion Denying Post-Trial Motions, p. 7.)

Moreover, since the court's instructions defined separate potential areas of interest which might have been concealed (the allegedly

concealed interest of the defendant Tamer or the allegedly concealed interest of the defendant Goldfarb), the court's instructions with respect to the conspiracy count permitted the petitioner to be convicted upon a finding that he conspired to conceal his own interest in or operation of the casino, or that the object of the conspiracy was the concealment of the interest in or operation of the casino by James Tamer — as the trial judge put it, a "Goldfarb-centered" or "Tamer-centered" conspiracy. (Opinion Denying Post-Trial Motions, p. 7.)[9]

With respect to the substantive count, the trial judge specifically instructed the jury that they might find petitioner guilty on the basis of conduct which constituted unlicensed operation or control over gaming, or alternatively, on the basis that his conduct violated the "work permit" statute, NRS 463.335, which is not a licensing requirement, and which is wholly separable from the first theory. The trial judge referred to the alternative theories as the "operator-manager theory" as contrasted with the "gaming employee theory." [TT, pp. 3525-3526]

In submitting the charges against the petitioner to the jury on alternate theories of liability, the trial court's instructions undercut petitioner's right to a unanimous verdict.

Thus, with respect to the substantive count, six jurors could have found the defendant guilty upon the basis that they were convinced beyond a reasonable doubt that his conduct violated NRS 463.335, but did not constitute unlicensed operation, as the court defined it, and six jurors might have found him guilty on precisely the opposite basis — that his conduct constituted unlicensed operation, but did not violate NRS 463.335. With respect to the conspiracy count, half the jurors might have found him guilty upon the basis that his con-

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[9] It is the understanding of the petitioner that the Petition for a Writ of Certiorari to be filed on behalf of Mr. Tamer will raise this argument with respect to the conspiracy count, and will do so at some length. That argument is directly relevant to petitioner, and petitioner would, with leave of the Court, adopt and join in it.

duct violated the "operation by concealment" aspect of Nevada law as defined by the trial court, but not "concealment of operation," and six on precisely the opposite reasoning. Similarly, with respect to the conspiracy count, six of the jurors might have found the defendant guilty on the basis that he had conspired to conceal his own interest in the casino, but not the defendant Tamer's and six jurors on the basis that he had conspired to conceal the defendant Tamer's interest, but not his own.

Such a situation runs clearly afoul of the fundamental guarantee of a unanimous verdict upon which a defendant in a federal criminal case has a right to rely, if for no other reason than by virtue of the provisions of Rule 31(a), Federal Rules of Criminal Procedure. See *e.g.*, *United States v. Gipson*, 553 F2d 453 (5th Cir. 1977).

Once the trial court's view of the case became clear to the petitioner, and the possibility for alternate bases of a jury finding of unlawful activity manifest, he, along with the defendant Tamer, submitted a jointly requested jury instruction (No. 12) which would have cautioned the jurors that, while they might find either defendant guilty on the basis of varying theories of illegality, they must all agree as to the sufficiency of the evidence to support any particular theory of illegality before that theory could form the basis for a conviction. The trial court, however, refused the request and instead gave only a standard instruction which advised the jurors that their verdict "must represent the unanimous considered judgment of each juror," [TT, p. 3999] but which did not in any way address the question of differing theories of "unlawful activity." There is simply no way in which any juror would have known or understood from any portion of the trial court's instructions that they must all agree upon one or another of the various theories of criminal liability which were submitted to them before such a theory could form the basis for a conviction. Thus, the Court of Appeals' disposition of this issue upon the basis that "the jury was also instructed that its verdict had to be unanimous," (Slip Opinion, pp. 16-17) in no way is responsive to the issue raised, or the state of the record below.

In *United States v. Gipson*, *supra*, the Fifth Circuit Court of Appeals specifically held that a trial court's instruction which permitted a jury to convict a Dyer Act defendant charged in an indictment with receiving, concealing, storing, bartering, selling or disposing of a stolen motor vehicle without all twelve jurors agreeing on the way in which the defendant violated the statute to offend the requirement of unanimity. *Gipson* has been the subject of much comment, see *e.g.*, *United States v. Gipson*: Duplicity Denies Right to Unanimous Verdict, II DCL Law Review 319 (1978), and the issue which it discusses is one which has never received the direct attention of this Court. Because of the way in which federal statutes and indictments are ordinarily drafted, and because of the fundamental nature of the rights and values involved, the question there and here at issue is of great moment to the federal criminal jurisprudence. The decision of the Sixth Circuit in the case at bar is in essential conflict with that of the First Circuit in *Gipson*, *supra*. For these reasons, as well as the fundamental wrong done to the petitioner, the Court should grant certiorari in the instant case to review the decisions below.

CONCLUSION

The instant Petition presents important questions of federal statutory and constitutional law, which have received treatment in the courts below which is not only inconsistent with applicable decisions of this Court, and in some respects in conflict with the decisions of other circuits, but which has also worked a fundamental injustice to the petitioner.

The Court should issue a writ of certiorari to review the questions presented, and should reverse the decision of the Sixth Circuit Court of Appeals and petitioner's convictions and sentence.

Respectfully submitted,

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APPENDIX

OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS AFFIRMING PETITIONER'S CONVICTION

Nos. 79-5255, 79-5317, 79-5318, 79-5319, 79-5320

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES GOLDFARB, JAMES TAMER, JAMES ABRAHAM, EDWARD MONAZYM, AND THE ALADDIN HOTEL CORPORATION,
Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed March 5, 1981.

Before: WEICK, LIVELY and BROWN, Circuit Judges.

WEICK, Circuit Judge. Appellants ~~James~~ CHARLES Goldfarb and James Abraham appeal from judgments of conviction entered upon jury verdicts of guilty of the substantive offense prescribed by the Travel Act, 18 U.S.C. § 1952.[1] All of the

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[1] 18 U.S.C. § 1952 provides in pertinent part that:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> • • •
>
> (3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3) shall be

appellants appeal from judgments of conviction for conspiracy to violate the Travel Act, 18 U.S.C. § 371.[2] The appeals were consolidated for oral argument.

The appellants raise a number of issues on appeal[3] in their

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fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed or of the United States, . . .

[2] 18 U.S.C. § 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[3] These include the following:

(a) Appellant Tamer raises issues dealing with the denial of his right to a unanimous verdict, the trial court's failure to exclude certain evidence, the court's instructions to the jury and denial of his motion to suppress.

(b) Aladdin contends that the conspiracy against it was a legal and factual impossibility; that the indictment should have been dismissed for vagueness or in the alternative that the court erred in failing to grant the motion for a bill of particulars; and that the court erred in failing to grant its motion for severance.

(c) Abraham contends that the evidence against him was insufficient to support his conviction; that certain evidence of an uncharged conspiracy should not have been admitted; that certain *in camera* proceedings conducted to the exclusion of Abraham constitute reversible error; and that he was entitled to a mistrial as a result of the prosecution's allegedly irrelevant and prejudicial questioning of a character witness.

(d) Monazym challenges the sufficiency of the evidence against him; alleges the existence of multiple conspiracies and prejudicial variance; and claims violations of his 6th Amendment right to counsel as a result of the *in camera* proceedings which were conducted to his exclusion.

(e) Other aspects of the "common argument" involve variance and amendment of the indictment, and misstatements and misconstructions of Nevada statutes and regulations.

(f) Each appellant expressly adopts the arguments of his co-

separate briefs. Each appellant assigns errors which pertain specifically to the government's case against him, and the appellants together present a number of common arguments. One such common argument has several facets and is variously formulated by each appellant. It relates to the treatment by the court of Gaming Regulations promulgated by the Nevada Gaming Commission pursuant to statutory authority, violations of which appellants claim do not constitute unlawful activity as prohibited by the Travel Act.

District Judge Feikens carefully considered all of these issues in his "Opinion Denying Post Trial Motions" for judgments of acquittal, new trial, and arrest of judgment. App. 438-458. We agree with his decision and affirm the judgments of conviction for the reasons set forth therein on which we will elaborate hereinafter.

Judge Feikens denied a pretrial motion of the defendants to dismiss the indictment in an opinion reported in *United States* v. *Goldfarb*, 464 F. Supp. 565 (E. D. Mich. 1979) in which he ruled upon the constitutionality of the Nevada Gaming Control Act and held it was not unconstitutional as being violative of the due process rights of defendant Goldfarb who was denied a gaming license.

In these appeals, the parties have filed four volumes of appendices, 4,000 pages of transcripts, and tapes recording conversations played for the jury but not included in the transcripts.

Mostly issues of law are raised in the briefs. The brief of Goldfarb's counsel commendably states: "The sufficiency of the evidence to sustain the jury verdict is not in question here."

Goldfarb had a remedy in the state court of Nevada which he invoked to compel the issuance of a license to him but he

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appellants to the extent they apply pursuant to the Federal Rules of Appellate Procedure, Rule 28(i).

All of these issues were carefully considered by District Judge Feikens in his "Opinion Denying Post Trial Motions" for judgments of acquittal, new trial, and arrest of judgment. App. 438-458.

dismissed the suit. The trouble here is that Goldfarb and the other defendants, by concealment and violation of Nevada statutes and their implementing regulations authorized by the statutes, were actually engaged in the illegal unlicensed management, maintenance, control and operation of the hotel and casino.

I

Defendant-appellant Charles Goldfarb was a bondsman who resided in Birmingham, Michigan. In 1971, he and a small group of investors purchased the Aladdin Hotel and casino, located in Las Vegas, Nevada, which at that time was owned by the Recrion Corporation. Goldfarb then applied to the State Gaming Control Board/Nevada Gaming Commission for licensure as a stockholder-officer of the new corporation, Aladdin Hotel Corporation. His request was denied when the Nevada Gaming Commission determined that he had an "unsuitable background and unsuitable associations." Goldfarb then divested himself of his eight percent (8%) interest in the hotel-casino. He later acquired an option to purchase stock from a licensed stockholder of the new corporation and reapplied for a stockholder's license. That application is still pending and has not been ruled upon by the Commission. Apparently, it has not been pressed.

The bulk of the evidence presented against the appellants consisted of over 100 telephone conversations intercepted by the government agents pursuant to court authorization. In all, approximately 15,000 calls were intercepted. The conversations introduced at trial were between Goldfarb and his co-defendants: James Tamer, the Entertainment Director of the Aladdin; James Abraham, the Executive Vice-President and General Manager of the Aladdin; and Edward Monazym, a Casino employee; as well as some calls between third parties and the various co-defendants.

The evidence adduced at trial showed that Goldfarb, having

failed in his attempt to become a licensee owner of the hotel casino, did with the aid of the other defendants, maintain a secret and illegal role in the ownership, operation, conducting and carrying on of the gaming operations of the hotel casino. He recommended complimentary services, including free accommodations, for certain customers and had a hand in arranging for the extension of credit for individuals whom he sent to the hotel. His advice and assistance was sought and given concerning certain financial problems of the hotel as well, including arrangements for emergency financing with false net worth statements to an unnamed bank or banks and also possible sale or lease of the hotel. He finally arranged for a loan from the Teamsters Pension Fund. The government contended that this was in keeping with the defendants' scheme to engage in the clandestine ownership, conducting and carrying on of the gaming operations of the Aladdin by persons not licensed to do so and whose interest in the casino had been concealed from the state in violation of certain Nevada statutes and regulations.

The defendants contended that the evidence was perfectly consistent with the fact that Goldfarb was a valued customer of the casino; a former investor, and possibly a future stockholder-officer of the corporation; a close associate of the management personnel of the hotel; and an individual who had used his contacts to direct many so-called "highrollers" to the hotel, many of whom then became regular customers who lost large sums in gambling.

This was a disputed issue of fact requiring resolution by the jury.

The Travel Act, as applied to the instant case, required that a facility of interstate commerce (here a telephone) be used to promote, establish, carry on, etc., an unlawful activity. "Unlawful activity" is defined as any business enterprise involving gambling offenses in violation of the laws of the state in which they are committed.[4]

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[4] See footnote 1, *supra*.

There is some dispute as to the nature and essentiality of the underlying state law violation, although most decisions agree that it is the violation of federal law which is the gravamen of a Travel Act offense. *United States* v. *Prince*, 529 F. 2d 1108 (6th Cir. 1976), *cert. den.*, 429 U.S. 838; *United States* v. *Polizzi*, 500 F. 2d 856 (9th Cir. 1974), *cert. den.*, 419 U.S. 1120 (1975). Some courts hold that proof of the commission or attempted commission of a state defined criminal offense is an essential element of a Travel Act conviction, *United States* v. *Hiatt*, 527 F. 2d 1048 (9th Cir. 1975); *United States* v. *Polizzi, supra; United States* v. *Kahn*, 472 F. 2d 272 (2d Cir. 1973), *cert. den.*, 411 U.S. 982, while others hold that it is not. *United States* v. *Prince*, 515 F. 2d 564 (5th Cir. 1975), *cert. den.*, 423 U.S. 1032; *United States* v. *Goldfarb*, 464 F. Supp. 565 (E. D. Mich. 1979). It is certainly true that the state crime need not be actually accomplished. *United States* v. *Pomponio*, 511 F. 2d 953 (4th Cir. 1975), *cert. den.*, 423 U.S. 874.

It is abundantly clear that as a predicate to a Travel Act conviction, absent a distinct violation of a law of the United States, the defendants must have engegad in some form of unlawful activity prohibited by the law of the State of Nevada. This contention is beyond dispute and amply supported by the language of the Act and by the case law.

II

The defendants-appellants were indicted on a four-count Revised Indictment.[3] In Count One of the indictment, Goldfarb was charged with a substantive violation of the Travel Act. The alleged "unlawful activity" was the

> ownership, operation, conducting and carrying on of gaming operations of a Las Vegas, Nevada gaming casino, the ALADDIN HOTEL AND CASINO, by a person who

[3] The original indictment consisting of 22 counts was found to be multiplicitous by the trial court.

was not licensed by and whose interest in the gaming casino had been concealed from agencies of the State of Nevada in violation of Nevada Revised Statutes, Sections 463.160.1(a)[6] and 463.335,[7] and Nevada Gaming Commission Regulations 3.100 paragraph 1, (b), (d), (f), (g) and (i), 3.100 paragraph 3,[8] 3.110[9] and 8.060.[10]

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[6] NRS § 463.160(1)(a) provides:

License required.

1. It is unlawful for any person, either as owner, lessee or employee, whether for hire or not, either solely or in conjunction with others:

(a) To deal, operate, carry on, conduct, maintain or expose for play in the State of Nevada any game or slot machine as defined in this chapter, or to operate, carry on, conduct or maintain any horserace book or sports pool;

* * *

without having first procured, and thereafter maintaining in full force and effect, all federal, state, county and municipal gaming licenses as required by statute or ordinance or by the governing board of any unincorporated city or town.

[7] NRS § 463.335 provides in pertinent part:

Gaming employees required to hold work permits; hearings and review; confidential records; expiration of work permits.

1. As used in this section:

(a) "Gaming employee" means any person connected directly with the operation of a nonrestricted establishment, and includes without limitation:

(1) Boxmen;
(2) Cashiers;
(3) Dealers;
(4) Floormen;
(5) Hosts or other persons empowered to extend credit or complimentary services;
(6) Keno runners;
(7) Keno writers;
(8) Machine mechanics;
(9) Security personnel;
(10) Shift or pit bosses;
(11) Shills; and
(12) Supervisors or managers.

"Gaming employee" does not include bartenders, cocktail waitresses or other persons engaged in preparing or serving food or beverages. . . .

[8] Nevada Gaming Commission Regulation 3.100 provides in pertinent part:

Employee report.

1. Annually, on or before the 15th of July, each nonrestricted licensee, as defined in Reg. 4.030.1(b), shall submit an employee report to the board on a form to be furnished by the board.

The indictment alleges specific acts committed by Goldfarb in the course of the performance of the unlawful activity.

Appellant Tamer was acquitted by the jury of the substantive Travel Act count but was convicted of conspiracy.

The report shall identify every individual who is directly or indirectly engaged in the administration or supervision of the gaming operations or physical security activities of such non-restricted licensee. The following classes of gaming employees are presumed to be actively and directly engaged in the administration or supervision of gaming:

. . .

(b) All individuals who may approve or extend gaming credit in any amount, or whose recommendations in this regard are ordinarily sought or followed:

. . .

(d) All individuals who have the authority to supervise or direct a shift of any gaming or security activity, including but not limited to supervision or direction of the pit area, keno or bingo games, slot machines, race or sports books, pari-mutuel operations, or any persons having authority to supervise or direct such persons;

. . .

(f) All individuals who may approve or extend to casino patrons complimentary house services other than beverages only;

(g) All individuals who supervise or direct other employees engaged in the control of gaming assets and revenues and record keeping, including the recording of cash and evidences of indebtedness, and the maintenance, review or control of the records, accounts, and reports of transactions which are required to be kept pursuant to Reg. 6;

. . .

(i) All individuals who individually or as a part of a group formulate management policy.

. . .

3. Any changes, additions, or deletions to any information contained within the annual employee report which occurs subsequent to the filing of the report and prior to the filing of the report for the next calendar year shall be reported to the board in writing no less than 10 days after the end of the calendar quarter during which the change, addition, or deletion occurred.

[9] Nevada Gaming Commission Regulation 3.110 provides in pertinent part:

Key employee.

1. Any executive, employee, or agent of a gaming licensee having the power to exercise a significant influence over decisions concerning any part of the operation of a gaming licensee or who is listed or should be listed in the annual report required by Reg. 3.100 is a key employee.

Count Three charged appellant Abraham with a substantive violation of the Travel Act in much the same language as the charge against Goldfarb. The alleged unlawful activity was based upon the same Nevada Statutes and Regulations.[11] Abraham was alleged to have discussed with Goldfarb the extension of complimentary privileges to patrons of the Aladdin which constituted, directly or indirectly, the administration, supervision and influence of Goldfarb over the gaming operations of the Aladdin with the consent and assistance of Abraham and in violation of the aforementioned statutes and regulations. Abraham was convicted on this count.

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2. Whenever it is the judgment of at least 3 members of the commission that the public interest and the policies set forth in Nevada Revised Statutes Chapter 463, the Nevada Gaming Control Act, will be served by requiring any key employee to be licensed, the commission shall serve notice of such determination upon the licensee. The commission shall not be restricted by the title of the job performed but shall consider the functions and responsibilities of the person involved in making its decision as to key employee status. Grounds for requiring licensing of a key employee which are deemed to serve the public interest and the policies of the Nevada Gaming Control Act include but are not limited to the following:

(a) The key employee is new to the industry, the particular gaming establishment, the position, or the level of influence or responsibility which he has and the board or commission has little or outdated information concerning his character, background, reputation, or associations, or

(b) Information has been received by the board or commission which, if true, would constitute grounds for a finding of unsuitability to be associated with a gaming enterprise.

[10] Nevada Gaming Commission Regulation 8.060 provides:

Participation in operations. Except as and to the extent provided in these regulations pertaining to emergency situations, or on written approval of the commission, no person who proposes to acquire an interest in any licensed gaming operation, in a licensee or in a holding company shall in connection therewith take any part or be permitted to take any part whatever, as an employee or otherwise, in the conduct of such gaming operations or in the operation of the establishment wherein such gaming operations are conducted during the pendency of his application for license or to be permitted to acquire such interest.

[11] The statutes and regulations relied upon are identical except that Count Three omits Nevada Gaming Regulation 3.100(1)(b) and (g).

Count Four is the conspiracy count of the indictment on which all of the defendants were convicted. It charged that the defendants willfully and knowingly conspired to use facilities of interstate commerce to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely; the ownership, operation, conducting and carrying on of gaming operations of a Las Vegas, Nevada gaming Casino by persons who were not licensed to do so and whose interest in the gaming casino had been concealed from the State of Nevada and did thereafter commit acts in order to promote this unlawful activity, all in violation of 18 U.S.C. § 1952, 18 U.S.C. § 371.

As before stated, the appellants filed two joint motions to dismiss the original indictment. Those motions apply equally to the revised four-count indictment. In the motion the appellants argued, *inter alia*, that Nevada Gaming Commission Regulations are not "law" for the purposes of criminal prosecutions. From the earliest stages of the proceedings, the defendants objected to and expressed concern over the notion that a violation of a Nevada Gaming Commission regulation could form the predicate state law violation required for a federal prosecution under the Travel Act. It could not in and of itself.

In response to the motion to dismiss, the government stated that:

> . . . the predicate "unlawful activity" in this prosecution arises from the violations of the cited Nevada *statutes* in each count. The additional citation to the regulations is solely to provide additional particularity in indicating the application of the statute to the specific activity described in each count. We do not quarrel with the defense position that violations of the regulations in and of themselves are not criminal acts within the purview of the Travel Act. . . .
>
> We do not quarrel that the defendants would be en-

> titled to a charge that in order to find a defendant guilty of a particular count that it must find a defendant violated the provisions of the Nevada statute cited and described therein.
>
> (Government's Response to Motion to Dismiss, Appendix p. 138-39.)

Still claiming inability to comprehend and therefore defend against the charges, the defendant's filed a joint motion for a bill of particulars. The court requested the parties to agree among themselves as to the particulars which they apparently did.

The court instructed the jury as follows:

> Now as to the meaning of the phrase unlawful activity in the Travel Act, the State of Nevada has a comprehensive scheme of regulatory statutes. Under those statutes a gaming commission and a gaming board are established and they are commanded to and have enacted regulations which have the force of law. It is that law which defines unlawful activity.

In *Berman* v. *Riverside Casino Corp.*, 247 F. Supp. 243, 248 (D. Nev. 1964), *aff'd* 354 F. 2d 43 (9th Cir. 1965), the court held that regulations promulgated by the Nevada Gaming Commission "have the force and effect of law." Cf. *United States* v. *Polizzi*, 500 F. 2d 856, 875 (9th Cir. 1974), *cert. den.*, 419 U.S. 1120 (1975).

N. R. S. 463.1594 specifically provides that the regulations are intended to implement the provisions of the statutes requiring disclosure of a corporate licensee's key personnel. Also, N. R. S. 463.150(2)(a) provides that the regulations shall prescribe "the method and form of application which any applicant for a gaming license . . . shall follow and complete . . . ." The court was thus required to include an instruction on regulations so that the jury would not completely disregard them. The court did not instruct the jury at any

place that a violation of a regulation, in and of itself, constituted an "unlawful activity." To give such an instruction would have been prejudicial error. *United States* v. *Eaton*, 144 U.S. 677 (1892); *Singer* v. *United States*, 323 U.S. 338 (1944).

In *United States* v. *Grimaud*, 220 U.S. 506, 517 (1910) the court stated:

> From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations – not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.

Reliance by appellants on *United States* v. *Gordon*, 464 F. 2d 357 (9th Cir. 1972) is misplaced. That case held that bookmakers and their employees do not engage in illegal gambling business within the prohibition of federal law by violating nonpenal regulations of state gaming commission. *Gordon* appears to be somewhat in conflict with the subsequent decision of the Ninth Circuit in *Polizzi* and is not even cited or discussed in *Polizzi*.

In *United States* v. *Seelig*, 622 F. 2d 207, 210 (6th Cir. 1980), we considered violations of the Controlled Substances Act, 21 U.S.C. § 841(a)(1) and regulations promulgated thereunder which were authorized by Congress. There, as here, the defendants contended that violations of the regulations did not constitute an offense. We stated:

> The combination of § 829(c) and § 822(b) thus requires a person to dispense or distribute a schedule V drug for a

> medical purpose and to be within the authority of their registration as determined by the Attorney General. Section 822(a) requires every person who distributes or dispenses controlled substances to register with the Attorney General. Section 821 authorizes the Attorney General to promulgate rules and regulations relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances. Section 871(b) authorizes the Attorney General to promulgate and enforce rules, regulations and procedures that he deems necessary for the efficient execution of his functions.
>
> Although Congress was not as clear in this statute as in the one involved in *Grimaud*, this Court is satisfied that the statute does expressly, albeit in a convoluted fashion, provide that a violation of the promulgated rules constitutes an unlawful act under the Controlled Substances Act. Thus, counts 1-165 do charge crimes.

During the presentation of evidence to the jury in response to the defendants' and the trial court's desire to have the legal theory of the case made clear, the government filed a document entitled "Government's Theory of the Case." Here again, the government disclaimed reliance upon the Nevada Gaming Regulations alone, stating that: "to be sure, a violation of the Regulations which is not concomitant with a statutory violation will not support a Travel Act violation." (Appendix, p. 283)

Thus the violation of the Nevada statutes and implementing regulations would constitute unlawful activity under the Travel Act. The disclosure provisions required by Regulation 3.100 are cumulative to those contained in the Nevada statutes. N. R. S. 463.165, 463.339, 463.520, 463.530, 463.560.

In any event, under the conspiracy count, the violation of the regulations alone would certainly be considered as overt acts by the defendants committing them which are ingredients of the crime of conspiracy.

III

With this principle in mind, we now turn to the trial court's instruction to the jury on the meaning of "unlawful activity" and the significance of the Nevada Gaming Regulations.

The court first instructed the jury on Count IV of the indictment, the conspiracy charge. After preliminary matters of defining conspiracy and its elements to the jury, the court began to instruct on the application of the Travel Act. After reading the Act, in pertinent part, the court instructed on the meaning of the phrase "unlawful activity." As a general background, the court instructed as follows:

> . . . the state of Nevada has a comprehensive scheme of regulatory statutes. Under these statutes a gaming commission and a gaming board are established and they are commanded to and have enacted regulations which have the force of law. It is that law which defines unlawful activity.
>
> In order to regulate gambling under Nevada law these statutes require full disclosures. Only through full and accurate disclosure of all persons who are connected with gambling in Nevada can the Nevada gaming authorities properly perform their functions in excluding from the industry all who are in the authorities' opinions, unsuitable or undesirable for any number of reasons. (Appendix 1205-06)

The court further instructed the jury on unlawful activity based upon a violation of Nevada statutory law as follows:

> Nevada Revised Statute 463.530 requires that all persons who require [sic] to become owners or shareholders in a gaming operation must have come before the Nevada gaming authorities for determination as to the suitability for license. The Nevada gaming authorities then make a decision whether to then issue a license to an applicant. If they deny the applicant a license, that person may not

then thereafter exercise any ownership of, operation, conduct of the gaming affairs of the casino.

Another Nevada statute, NSR 463.130, states that the violation of these Nevada gaming statutes is a crime, a gross misdemeanor. Thus, by concealment of his ownership or operation or conduct in the gaming conspiracy, a person may violate the Nevada laws.

Keep in mind it is not the concealment itself which is the violation of the statute I have just discussed but rather the violation is the unlicensed ownership or operation of the gaming casino which is accomplished by concealment. (Appendix, p. 1206-07)

The court then continued:

I now take up another aspect of the Nevada laws on gambling. One of the regulations, [3].100, which is mandated by Nevada statute is required, [sic] all holders of non-restricted licenses to disclose to the Nevada gaming authorities names of all persons exercising significant control and influence over gaming. Any changes in such activities must also be reported to the Nevada gaming authorities because of a strong state policy requiring disclosure of all persons who have significant control and influence as to gaming, and because of the statutory command that all gaming licenses which, whether held by a corporation such as the Aladdin Hotel or by individuals, must be maintained in conformity with all relevant provisions.

I instruct you that it is illegal under Nevada gaming laws for anyone exercising a significant control and influence as to gaming to conceal that control and influence from the Nevada gaming authorities. The essence or gist of the violation I have just outlined is concealment, for which failure to disclose, this must be contrasted with the first instance of violation I described earlier, that violation having to do with an unlawful or unlawful licensing viola-

> tion of the Nevada casino, where the concealment is a means to achieve the violation but not itself the actual unlawful activity. (Appendix, p. 1207-08)

This in our opinion correctly stated the Nevada law.

In the instruction on the substantive offense charge against Goldfarb, the court stated that:

> [h]eretofore I have discussed with you in considering the charge of conspiracy as to entail the meaning of the phrase unlawful activity. Without repeating those instructions that I gave you then with the request that you keep them in mind here, I specifically charge you that the unlawful activity which it is alleged the defendant Goldfarb engaged in is as follows: . . .

The court then described a statutory theory based on Nevada Revised Statutes § 463.335 as was done in the conspiracy charge. In concluding the instruction, the court again offered the jury the elements of unlawful activity:

> Additionally, in order for you to find the Defendant Goldfarb guilty of the charges contained in Count I of the indictment, the Government must also prove beyond a reasonable doubt either that:
>
> (1) Defendant Goldfarb willfully engaged in the ownesrhip, operation or conducting or carrying on of gaming operations of the Aladdin Hotel and Casino without a license from the Nevada Gaming Authorities to do so, or;
>
> (2) Defendant Goldfarb willfully concealed his ownership, operation or conducting or carrying on of gaming operations of the Aladdin Hotel and Casino from the Nevada Gaming Authorities for which he was not licensed.
>
> Or both of these elements. (Appendix pp. 1217-18)

This instruction was not duplicitous as claimed for either or both elements constitute an offense under Nevada law. The

jury was also instructed that its verdict had to be unanimous.

In its opinion denying post trial motions, the court relied on the Nevada statutes which it stated were broad enough to encompass Goldfarb's conduct. (App. 440)

IV

The indictment charged Tamer with violating NRS 463.-160.1(a) and Nevada Gaming Commission Regulations 3.100 (1)(i), 3.100(3) and 3.110. He was charged with performing as a "key employee" without being licensed to do so. Tamer was acquitted of the substantive Travel Act violation.

After reading the indictment and summarizing the Travel Act, the court instructed on the meaning of "unlawful activity" as follows:

> Under Nevada gaming laws a casino (or non-restricted licensee as it is called) must report to the Nevada Gaming Authorities the identity of anyone who is directly or indirectly involved in the casino's administration; that is, anyone who has a significant influence and control at the casino. The regulation that requires this disclosure has the force of law and its requirement of disclosure is in harmony with a number of other Nevada gaming statutes. Thus, under Nevada gaming law, it is required that the casino disclose the identity of anyone exerting significant influence and control at the casino. The disclosure is necessary so that the Nevada Gaming Authorities can regulate gambling by determining that such a person should be licensed, if he is to continue the exercise of significant control and influence at the casino. Now, the Aladdin itself is not charged with the violation. However, defendant Tamer is; it is charged in this indictment that defendant Tamer did, in concert with the Aladdin, cause his true role at the casino to be concealed from the Nevada Gaming Authorities, in violation of Nevada gaming laws.

V

As to Abraham, the district court in instructing on Count III of the indictment again carried through its interpretation of "unlawful activity." The court charged the jury as follows:

> The unlawful activity here charged is a certain kind of unlawful activity as is charged in Count I against Defendant Goldfarb, although the telephone call alleged in the indictment between defendant Goldfarb and defendant Abraham occurred on March 15, 1977. (Appendix pp. 1226-27)
>
> • • •
>
> Additionally, in order for you to find defendant Abraham guilty of the charges contained in Count III of the indictment, the Government must also prove beyond a reasonable doubt that defendant Abraham aided and abetted defendant Goldfarb in either willfully engaging in the ownership, operation, or conducting or carrying on of gaming operations of the Aladdin Hotel and Casino without a license from the Nevada Gaming Authorities to do so, or in aiding and abetting the defendant Goldfarb in willfully concealing his ownership, operation or conducting or carrying on of gaming operations of the Aladdin Hotel and Casino from the Nevada Gaming Authorities for which he was not licensed; or both of these elements. (Appendix p. 1229)

Thus the district court instructed the jury on the unlawful activities; one based on the unlicensed operation of the Aladdin; the other based on concealment which found its origin in the court's construction of the Nevada Statutes and Gaming Regulations, especially 3.100. In our opinion these instructions were correct.

VI

Goldfarb contends that there was a variance between the allegations in the indictment and the evidence which resulted

in a judicial amendment of the indictment. Judge Feikens correctly dealt with these issues in his opinion denying post trial motions stating:

> It appears Goldfarb alludes to principles of variance and amendment. The two concepts are closely related. Variance refers to the failure of the government's proofs to conform to the indictment. A variance is not fatal to the prosecution unless the defendant could not reasonably have anticipated from the indictment what evidence would be presented at trial or unless the indictment is so vague as not to bar subsequent prosecution on the same offense. *United States* v. *Knuckles*, 581 F 2d 305, 309 311, (2nd Cir), *cert. denied* 99 S Ct 581 (1978); *United States* v. *Fruehauf Corp.*, 577 F 2d 1038, 1056 (6th Cir), *cert. denied* 99 S Ct. 349 (1978); *United States* v. *Dunn*, 577 F 2d 119, 123 (10th Cir 1978); *Watson* v. *Jago*, 558 F 2d 330, 333-334 (6th Cir 1977); *United States* v. *Maselli*, 534 F 2d 1197, 1201-1202 (6th Cir 1976). A variance is not ground for reversal unless the defendant's substantial rights are abridged. *United States* v. *Berger*, 295 U.S. 78, 82 (1934). In this case I find no prejudicial variance.
>
> The apparent amendment claim needs more analysis, but it too is without merit. It is settled since *Ex Parte Bain*, 121 U.S. 1, 10 (1887) that neither the court nor the prosecutor may substantially change the indictment to "suit its own notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes . . ." This is in keeping with the principle that a court may not establish standards of conduct upon pain of imprisonment; such is the legislature's domain. An amendment to the indictment is *per se* reversible error. *United States* v. *Crocker*, 568 F 2d 1049, 1059 (3rd Cir 1977), *United States* v. *Fruehauf*, *supra*, at 1056. An amendment may be express or "constructive" (effective). *Id.* In determining whether there has been a constructive amendment

inquiry should focus on whether any essential element of the crime was proved by facts different than those alleged. *Stirone* v. *United States*, 361 U.S. 212 (1960). Thus, if the indictment alleges one sort of false testimony but the government is permitted to prove another sort, false testimony being necessary for conviction, an amendment has occurred. *United States* v. *Crocker, supra.* Similarly, in a Hobbs Act case, if a grand jury alleges one sort of interstate nexus while proof and argument show another, an amendment has occurred. *Stirone* v. *United States, supra. See United States* v. *Prejean*, 494 F 2d 495, 497 (5th Cir 1974); *United States* v. *Vesaas*, 586 F 2d 101, 103 (8th Cir 1978).

In this case, there were three elements the government was required to prove: (1) the use of an interstate facility; (2) actual or attempted promotion, etc. of an unlawful activity; (3) specific intent. *United States* v. *Prince*, 529 F 2d 1108, 1112 (6th Cir), *cert. denied* 429 U.S. 838 (1976). The proofs did not diverge from the course established by the requirement of these elements. The only apparent argument available to Goldfarb (and the other Defendants) is that the grand Jury did not pass upon the exact shape of the illegal acts in Nevada, which it is their constitutional right to have done. I find this contention without merit. The grand jury needed to know enough of the Nevada gaming laws to make the indictment sufficient, which it did. My interpretation of Nevada gaming law presented Defendants with no new factual charges that they were required to meet, to use variance phraseology, nor did it allow either proof or argument of a new factual basis for any element of the crime, to use amendment terminology. Moreover, the allegation as to the Nevada offense was broad enough to include the specific crime I have already explained. It has often been held that one way to guard against a constructive amendment claim is to draft an indictment with generality, *United States* v. *Crocker, supra*, at 1059, so long as it contains the necessary specificity.

VII

We find no prejudicial error in the court's denial of Abraham's motion to declare a mistrial because of improper cross-examination of a character witness. One of the character witnesses was General Ralph G. Taylor retired from the United States Air Force. Attempts were made by Abraham's attorney to introduce into evidence Abraham's gallantry as an officer and pilot, his two tours in Vietnam and his communications with the White House. The court excluded such evidence. We agree that it was not admissible except upon conviction to be considered in mitigation of the sentence. Error was assigned as to the cross-examination of the character witness Lovell, a former city attorney in Las Vegas, who volunteered that Abraham enjoyed a good reputation with Nevada's "law enforcement community." He was asked upon cross-examination whether he had heard that in order for a shop or store to do business with Aladdin Hotel Corporation to obtain store space in the area that payments were made personally to Abraham, not to the corporation. Lovell answered, "No, I don't know that." Before asking the question, at a side bar conference with the court not in the presence of the jury, the government produced evidence showing justification namely, the cancelled check and the court permitted the question to be answered and gave proper instruction to the jury as to its purpose. Further proceedings developed thereafter including rebuttal and surrebuttal evidence and when it appeared to everyone that this was creating a trial within a trial, the government moved to withdraw the question, in which counsel for Abraham joined. The trial court granted the motion finding that ". . . the spirit of *Michelson* v. *United States*, 335 U.S. 469 (1948) had been observed and the prejudice, if any, was dissipated in Abraham's favor." App. 452, 453. We find no abuse of discretion on the part of the District Judge in his handling of these issues.

Abraham and Monazym assign error because the trial court

held certain *in camera* proceedings to which they were not admitted. Abraham and Tamer assign error in the admission of evidence of tape recorded conversations and documents tending to prove that Goldfarb and Tamer used their influence with Leonard, the Prosecuting Attorney of Genesee County in local court proceedings which Tamer believed would assist him in securing a license in Nevada.

A special Grand Jury sought to return an indictment against Mr. Leonard which was not signed by the United States Attorney. Chief Judge Kennedy who conducted the *in camera* proceeding, wrote an opinion ordering the files sealed. The trial judge ordered that the defendants who had not participated in the *in camera* proceedings be given access to them.

The government had issued a subpoena for the testimony of Mr. Leonard but obtained a stipulation from all defense counsel which obviated the necessity for its production.

We find no abuse of discretion on the part of the trial judge nor any prejudice to Abraham and Monazym (See Opinion Denying Post Trial Motions, (App. 456)), nor was there any abuse of discretion in denying the motions for a severance or Tamer's motion to suppress evidence.

VIII

Appellant Monazym challenges the sufficiency of the evidence to support his conviction by the jury. The evidence is detailed by the District Judge in his Opinion Denying Post Trial Motions. (App. 449, 450). The evidence and the inferences to be reasonably drawn therefrom must be viewed in the most favorable light in favor of the government. *Glass* v. *United States*, 315 U.S. 60 (1942); *United States* v. *Dye*, 508 F. 2d 1226 (6th Cir. 1974); *United States* v. *Green*, 548 F. 2d 1261 (6th Cir. 1977). So viewed, we are of the opinion that the verdict of the jury is supported by abundant evidence. In our opinion, the indictment charged only a single conspiracy.

IX

Aladdin contends that the district court erred in denying its motion for a severance. It alleges that it could not defend itself except through the testimony of its alleged agents, who, as defendants in this joint trial, had countervailing Fifth Amendment rights not to testify.

The trouble with this argument is that the proof at the trial showed that conspiratorial acts were committed by at least six other officers, agents and employees of Aladdin who were not defendants. Aladdin did not call any of them to testify in its behalf. No showing was made by Aladdin that any of its officers, agents or employees were willing to testify in its behalf or exculpate it. There was no showing that in separate trials any defendant would waive his Fifth Amendment privilege.

This matter was addressed entirely to the sound discretion of the district court. Aladdin had a heavy burden to overcome which it was unable to do. *Cf. United States* v. *Vigil*, 561 F. 2d 1316 (9th Cir. 1977).

Conclusion

The judgments of conviction are affirmed.

ORDER OF SIXTH CIRCUIT COURT OF APPEALS DENYING PETITION FOR REHEARING

(Filed April 1, 1981)

Nos. 79-5255, 79-5317, 79-5318, 79-5319, 79-5320

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America
Plaintiff-Appellee

v. ORDER

Charles Goldfarb, James Tamer,
James Abraham, Edward Monazym,
and the Aladdin Hotel Corporation
Defendants-Appellants

Before WEICK, LIVELY and BROWN, Circuit Judges.

Upon consideration of the petitions for rehearing in which all of the appellants joined and also the separate motion for rehearing filed by Appellant Aladdin Hotel Corporation, we are of the opinion that the issues in these appeals were adequately treated in our signed opinion and that said petition for rehearing and motion for rehearing lack merit.

It is therefore ordered that the petition for rehearing and the separate motion for rehearing be denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

PROVISIONS OF FEDERAL AND STATE LAW AND REGULATIONS INVOLVED

The Fifth Amendment to the United States constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice but in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 18, United States Code, Section 371, provides, in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18, United States Code, Section 1952 provides, in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, or any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

Nevada Revised Statutes, §463.160.1(a) provides:

> 1. It is unlawful for any person, either as owner, lessee or employee, whether for hire or not, either solely or in conjunction with others:
>
> (a) To deal, operate, carry on, conduct, maintain or expose for play in the State of Nevada any game or slot machine as defined in this chapter, or to operate, carry on, conduct or maintain any horserace book or sports pool;
>
> without having first procured, and thereafter maintaining in full force and effect, all federal, state, county and municipal gaming licenses as required by statute or ordinance or by the governing board of any unincorporated city or town.

Nevada Revised Statutes, §463.335 provides:

1. As used in this section:

(a) "Gaming employee" means any person connected directly with the operation of a nonrestricted establishment, and includes without limitation:

(1) Boxmen;

(2) Cashiers;

(3) Dealers;

(4) Floormen;

(5) Hosts or other persons empowered to extend credit or complimentary services;

(6) Keno runners;

(7) Keno writers;

(8) Machine mechanics;

(9) Security personnel;

(10) Shift or pit bosses;

(11) Shills; and

(12) Supervisors or managers.

"Gaming employee" does not include bartenders, cocktail waitresses or other persons engaged in preparing or serving food or beverages.

(b) "Nonrestricted establishment" means any establishment except one in which slot machines only are operated incidentally to some other primary business of the licensee.

(c) "Temporary work permit" means a work permit which is valid only for a period not to exceed 30 days from its date of issue and is not renewable.

(d) "Work permit" means any card, certificate or permit issued by the board or by a county or city licensing authority, whether denominated as a work permit, registration card or otherwise, authorizing the employment of the holder as a gaming employee. A document issued by any authority for any employment other than gaming is not a valid work permit for the purposes of this chapter.

2. The legislature finds that, to protect and promote the health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada and to carry out the policy declared in NRS 463.130, it is necessary that the board;

(a) Ascertain and keep itself informed of the identity, prior

activities and present location of all gaming employees in the State of Nevada; and

(b) Maintain confidential records of such information.

3. No person may be employed as a gaming employee unless he is the holder of:

(a) A valid work permit issued in accordance with the applicable ordinances or regulations of the county or city in which his duties are performed and the provisions of this chapter; or

(b) If no work permit is required by either the county or the city, a work permit issued by the board.

A work permit issued to a gaming employee must have clearly imprinted thereon a statement that it is valid for gaming purposes only.

4. Whenever any person applies for the issuance or renewal of a work permit, the county or city officer or employee to whom the application is made shall within 24 hours mail or deliver a copy thereof to the board, and may at the discretion of the county or city licensing authority issue a temporary work permit. If within 30 days after receipt by the board of the copy of the application, the board has not notified the county or city licensing authority of any objection, the authority may in its discretion issue, renew or deny a work permit to the applicant. Any holder of a work permit must obtain renewal of the permit from the issuing agency within 10 days following any change of place of employment.

5. If the board within the 30-day period notifies the county or city licensing authority that the board objects to the granting of a work permit to the applicant, the authority shall deny the work permit and shall immediately revoke and repossess any temporary work permit which it may have issued.

6. Application for a work permit, valid wherever a work permit is not required by any county or city licensing authority, may be made to the board, and may be granted or denied for any cause deemed reasonable by the board.

7. Any person whose application for a work permit has been denied because of an objection by the board or whose application has been denied by the board may apply to the board for a hearing. At the hearing, the board or any designated member of the board or an examiner appointed by the board shall take any

testimony deemed necessary. After the hearing the board shall review the testimony taken and any other evidence, and shall within 30 days from the date of the hearing announce its decision sustaining or reversing the denial of the work permit or the objection to issuance of a work permit. The board may object to issuance of a work permit or may refuse to issue a work permit for any cause deemed reasonable by the board. The board may object or refuse if the applicant has:

(a) Failed to disclose, misstated or otherwise attempted to mislead the board with respect to any material fact contained in the application for the issuance or renewal of a work permit;

(b) Knowingly failed to comply with the provisions of chapters 463, 464 or 465 of NRS or the regulations of the Nevada gaming commission at a place of previous employment;

(c) Committed, attempted or conspired to commit any crime of moral turpitude, embezzlement or larceny against his employer or any gaming licensee, or any violation of any law pertaining to gaming, or any other crime which is inimical to the declared policy of this state concerning gaming;

(d) Been identified in the published reports of any federal or state legislative or executive body as being a member or associate or organized crime, or as being of notorious and unsavory reputation.

(e) Been placed and remains in the constructive custody of any federal, state or municipal law enforcement authority; or

(f) Had a work permit revoked or committed any act which is a ground for the revocation of a work permit or would have been a ground for revoking his work permit if he had then held a work permit.

8. Any applicant aggrieved by the decision of the board may, within 15 days after the announcement of the decision, apply in writing to the commission for review of the decision. Review shall be limited to the record of the proceedings before the board. The commission may sustain or reverse the board's decision. The decision of the commission shall be subject to judicial review pursuant to NRS 463.315.

9. All records acquired or compiled by the board or commission relating to any application made pursuant to this section and

all lists of persons to whom work permits have been issued or denied and all records of the names or identity of persons engaged in the gaming industry in this state are confidential and shall not be disclosed except in the proper administration of this chapter or to an authorized law enforcement agency.

10. A work permit expires unless renewed within 10 days after a change of place of employment or if the holder thereof is not employed as a gaming employee within the jurisdiction of the issuing authority for a period of more than 90 days.

Nevada Gaming Commission Regulation 3.100 provides:

1. Annually, on or before the 15th of July, each nonrestricted licensee, as defined in Reg. 4.030.1(b), shall submit an employee report to the board on a form to be furnished by the board. The report shall identify every individual who is directly or indirectly engaged in the administration or supervision of the gaming operations or physical security activities of such nonrestricted licensee. The following classes of gaming employees are presumed to be actively and directly engaged in the administration or supervision of gaming:

(a) All individuals who are compensated in any manner in excess of $40,000 per annum;

(b) All individuals who may approve or extend gaming credit in any amount, or whose recommendations in this regard are ordinarily sought or followed;

(c) All individuals who have authority to hire or terminate casino personnel;

(d) All individuals who have the authority to supervise or direct a shift of any gaming or security activity, including but not limited to supervision or direction of the pit area, keno or bingo games, slot machines, race or sports books, pari-mutuel operations, or any persons having authority to supervise or direct such persons;

(e) All individuals who regularly participate in the count more frequently than 1 day in each week or who actually participate in the count more than 10 days in any 30-day period;

(f) All individuals who may approve or extend to casino patrons complimentary house services other than beverages only;

(g) All individuals who supervise or direct other employees engaged in the control of gaming assets and revenues and record keeping, including the recording of cash and evidences of indebtedness, and the maintenance, review or control of the records, accounts, and reports of transactions which are required to be kept pursuant to Reg. 6;

(h) Any individual who has been specifically represented to the board or commission by a licensee or any officer or director thereof as being important or necessary to the operation of the gaming establishment;

(i) All individuals who individually or as part of a group formulate management policy.

2. The annual employee report shall also include a decription of the gaming duties, casino responsibilities, and casino authority delegated to each individual identified in the report.

3. Any changes, additions, or deletions to any information contained within the annual employee report which occurs subsequent to the filing of the report and prior to the filing of the report for the next calendar year shall be reported to the board in writing not less than 10 days after the end of the calendar quarter during which the change, addition, or deletion occurred.

4. The annual employee report and subsequent reports of changes, additions, or deletions shall be confidential and may not be disclosed except upon order of the commission or pursuant to the terms of NRS 463.130.

Nevada Gaming Commission Regulation 3.110 provides:

1. Any executive, employee, or agent of a gaming licensee having the power to exercise a significant influence over decisions concerning any part of the operation of a gaming licensee or who is listed or should be listed in the annual employee report required by Reg. 3.100 is a key employee.

2. Whenever it is the judgment of at least 3 members of the commission that the public interest and the policies set forth in Nevada Revised Statutes Chapter 463, the Nevada Gaming Control Act, will be served by requiring any key employee to be licensed, the commission shall serve notice of such determination upon the licensee. The commission shall not be restricted by the

title of the job performed but shall consider the functions and responsibilities of the person involved in making its decision as to key employee status. Grounds for requiring licensing of a key employee which are deemed to serve the public interest and the policies of the Nevada Gaming Control Act include but are not limited to the following:

(a) The key employee is new to the industry, to the particular gaming establishment, the position, or the level of influence or responsibility which he has and the board or commission has little or outdated information concerning his character, background, reputation, or associations, or

(b) Information has been received by the board or commission which, if true, would constitute grounds for a finding of unsuitability to be associated with a gaming enterprise.

3. The licensee shall, within 30 days following receipt of the notice of the commission's determination, present the application for licensing of the key employee to the board or provide documentary evidence that such key employee is no longer employed by the licensee. Failure of the licensee to respond as required by this section shall constitute grounds for disciplinary action.

4. Any individual whose application for licensing as a key employee is required pursuant to this regulation may request the commission in writing to review its determination of that individual's status within the gaming organization any time within 10 days following the filing of a completed application as required by this regulation. In the event the commission determines that the applicant is not a key employee or that the public interest and policies of the Nevada Gaming Control Act do not require the licensing of the key employee at this time, then the key employee applicant shall be allowed to withdraw his application and he may continue in his employment. In no event shall the request of the key employee applicant for review stay the obligation of the licensee to present the key employee's application within the 30-day period herein proscribed.